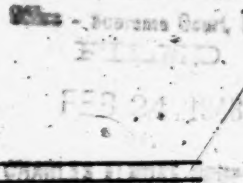


FILE COPY

No. 533



IN THE
Supreme Court of the United States
October Term, 1947

TORAO TAKAHASHI,

Petitioner,

v.

FISH AND GAME COMMISSION, LEE F. PAYNE, as
Chairman thereof, W. B. WILLIAMS, HARVEY E.
HASTAIN, and WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE AS AMICUS CURIAE.**

✓ THURGOOD MARSHALL,

✓ MARIAN WYNN PERRY,

*Counsel for the National
Association for the Advance-
ment of Colored People.*

EDWARD R. DUDLEY,
Of Counsel.

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**MOTION AND BRIEF FOR THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE AS AMICUS CURIAE.**

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court:*

The undersigned, as Counsel for the National Association for the Advancement of Colored People, respectfully move this Court for leave to file the accompanying brief as *Amicus Curiae* in the above entitled appeal.

The National Association for the Advancement of Colored People is a membership organization which for thirty-eight years has dedicated itself to and worked for the achievement of functioning democracy and equal justice under the Constitution and laws of the United States.

From time to time some justiciable issue is presented to this Court, upon the decision of which depends the evolution of institutions in some vital area of our national life. Such an issue is before the Court now.

The issue at stake in the above entitled petition for certiorari is the power of a state to discriminate among persons within its jurisdiction in their exercise of the right to earn a living in a common occupation. The determination of this issue involves an interpretation of the Fourteenth Amendment which will have widespread effect upon the welfare of all minority groups in the United States.

THURGOOD MARSHALL,
 MARIAN WYNN PERKY,
*Counsel for the National
 Association for the Advance-
 ment of Colored People.*

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**BRIEF FOR THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED
PEOPLE AS AMICUS CURIAE**

Opinion Below and Statute Involved

The opinion below and the statute involved are set forth in full in the record and in the petition for a writ of certiorari to this Court and are adopted herein as the statement of jurisdiction contained in that petition.

Questions Presented

I

Whether consistent with the Fourteenth Amendment the State of California may deny to a single class of alien residents of California the right to earn their living by commercial fishing.

II

Whether consistent with the treaty obligations of the United States the State of California may deny to a single class of alien residents of California the right to earn their living by commercial fishing.

Statement of the Case

The petitioner herein has been a resident of Los Angeles, California, continuously since 1907 with the exception of that period of time when he was excluded from California under the Military Exclusion Laws during World War II. From 1915 until his exclusion from the state by act of the Federal Government petitioner earned his living by commercial fishing on the high seas, which activity was carried on pursuant to a license from the Fish and Game Commission of the State of California (R. 1-6). In 1945, the State of California amended Section 990 of the Fish and Game Code (Stats. 1945, Ch. 181) so as to forbid the issuance of a commercial fishing license to a person ineligible to citizenship, or to corporations a majority of whose stockholders or any of whose officers were ineligible to citizenship. Upon the face of the statute no other criterion is applied for licensing. Upon petitioner's return to California in October, 1945 at the termination of the Military Exclusion Orders he found himself, after thirty years of employment as a commercial fisherman, completely barred from that field of employment.

The petition for certiorari in this Court is to review the judgment of the Supreme Court of California which reversed the holding of the Superior Court which had found that the Fish and Game Law, as amended, constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I

The question presented by the petition is one of national importance and involves a fundamental question of constitutional law.

II

A statute denying to a racial group the right to engage in a common occupation violates the equal protection clause of the Fourteenth Amendment.

III

A state law denying to a racial group the right to engage in a common occupation violates obligations of the Federal Government under the United Nations Charter.

ARGUMENT

I

The question presented by the petition is one of national importance and involves a fundamental question of constitutional law.

The legislation here presented for review was enacted at a time of strong anti-Japanese hysteria on the west coast

which revived the campaign of more than thirty years before to keep the Japanese out of California. This legislation like the Alien Land Law of California which was before this Court in *Oyama v. California*¹ was "designed to effectuate a purely racial discrimination," . . . "is rooted deeply in racial, economic and social antagonisms", . . . and "racial hatred and intolerance."² Like that law it is framed "to discourage the coming of Japanese into this state."³

This Court recognized in *Truax v. Raich* that:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."⁴

The end sought by this legislation reverts to the fundamental proposition upon which our country is founded, namely whether the states may by individual action divorce themselves from the common problems of the nation. The federal government has the exclusive right to determine whether Japanese aliens may enter this country, but the position of California asserts the right of state by individual action to nullify the act of the Federal Government and effectively exclude aliens from its territory. That such a

¹ 16 L. W. 4108. — U. S. — (decided January 19, 1948).

² *Ibid.*, concurring opinion of Mr. Justice MURPHY.

³ *Estate of Tetsubumi Yano*, 188 Cal. 645.

⁴ 239 U. S. 33, 42.

concept must be rejected is apparent from the words of Mr. Justice CARDOZO in *Baldwin v. G. A. F. Seelig, Inc.*:

"The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."⁵

This language was adopted by this Court in 1941 in upholding the right of *citizens* freely to move from state to state.⁶ The unity of our country's destiny, asserted in 1915 to stem an hysteria against "the yellow hordes" and in the days of economic depression to protect the poor and unemployed, must be reasserted today by this Court if we are to move forward towards a peaceful and democratic society in a truly "United" States.

II

A statute denying to a racial group the right to engage in a common occupation violates the equal protection clause of the Fourteenth Amendment.

While the statute on its face purports to have a certain impartiality by describing the proscribed group as "persons ineligible to citizenship", the 1940 Census Report⁷ shows that of 47,305 aliens ineligible to citizenship in the country, only 1,000 were other than Japanese. Of these, 33,569 were Japanese aliens residing in California.

Having so recently reviewed the legislative history of the California Alien Land Law in the *Oyama* case, this

⁵ 294 U. S. 511, 523.

⁶ *Edwards v. California*, 314 U. S. 160.

⁷ U. S. Census, 1940, *Characteristics of the Non-White Population*, p. 2.

Court cannot fail to recognize the same purpose and the same undemocratic motivation in the enactment of a law barring Japanese from a common occupation in the State of California. It remains only to be considered whether there is any reasonable basis which can be legally justified under the Fourteenth Amendment, for the classification of Japanese as a group ineligible to engage in commercial fishing.

"Such a rational basis is completely lacking where, as here, the discrimination stems directly from racial hatred and intolerance. The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity."⁸

As stated by this Court, through Mr. Justice HOLMES, in *Nixon v. Herndon*:⁹ "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is . . . clear . . . that color cannot be made the basis of statutory classification." The cold statistics of the number of ineligible aliens affected by this statute¹⁰ sweep away any contention that its basis is not the "yellow color" of the Japanese. It is of such color legislation that this Court stated in *Hirabayashi v. United States*:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a

⁸ Concurring opinion of Mr. Justice MURPHY, in *Oyama v. California*, *supra*.

⁹ 273 U. S. 536, 541.

¹⁰ See footnote 1, *supra*.

free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."¹¹

"No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong and which in the eye of the law is not justified. The discrimination is therefore illegal. . . ."¹²

This Court has long recognized that the Fourteenth Amendment guarantees the right of persons within the jurisdiction of a state not only "to be free from the mere physical restraint of his person" but also "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."¹³ Even the action of private associations sanctioned indirectly by the state or federal government, in excluding persons from employment because of race have been held prohibited by constitutional limitation.¹⁴

The legislation of the State of California seeking to prevent Japanese from engaging in a common occupation has no rational basis. Being based solely on race, it comes into fatal conflict with the Fourteenth Amendment.

¹¹ 320 U. S. 81, 100.

¹² *Yick Wo v. Hopkins*, 118 U. S. 356, 374.

¹³ *Allgeyer v. State of Louisiana*, 165 U. S. 589.

¹⁴ *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192.

III

A state law denying a racial group the right to engage in a common occupation violates obligations of the Federal Government under the United Nations Charter.

As set forth above in Point I, the United States Government has sole jurisdiction to admit aliens into the United States. Once such aliens are admitted they become entitled to those constitutional protections which under our form of government are afforded to all persons regardless of citizenship. More recently they have been afforded an added protection by the act of the United States in subscribing to the United Nations Charter, Article 55 of which has pledged this country to promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

The United Nations Charter is a treaty, duly executed by the President and ratified by the Senate (51 Stat. 1031). Under Article VI, Section 2 of the Constitution such a treaty is the "supreme Law of the Land" and specifically, "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The right to work has long been recognized as a fundamental human right in American law.¹⁵ The laws of California attempt to deny to Japanese this fundamental right in contravention of the international obligations of the United States.

¹⁵ *Allgeyer v. State of Louisiana*, *Steele v. Louisville & Nashville R. R. Co.* and *Truax v. Raich*, *supra*.

Historically, no doubt has been entertained as to the supremacy of treaties under the Constitution. Thus Madison, in the Virginia Convention, said that if a treaty did not supercede existing state laws, as far as they contravene its operation, the treaty would be ineffective.

"To counteract it by the supremacy of the state laws would bring on the Union the just charge of national perfidy, and involve us in war."¹⁶

While it is true that Japan is not a party to the United Nations Charter, the treaty obligations of the United States under the Charter are not limited simply to nationals of the other member nations. It has now become clear by the action of our own government and of other governments in international affairs that the treatment of any minority group within any country is a proper subject of international negotiations.¹⁷

Official spokesmen for the American State Department have expressed concern over the effect racial discrimination in this country has upon our foreign relations and the then Secretary of State, Edward R. Stettinius, pledged our

¹⁶ 3 Elliotts Debates 515; see also *United States v. Belmont*, 301 U. S. 324—"In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And, when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision."

¹⁷ See Raphael Lemkin, "Genocide as a Crime under International Law," *Am. J. of Int. Law*, Vol. 41, No. 1 (Jan. 1947), p. 145.

government before the United Nations to fight for human rights at home and abroad.¹⁸

The interest of the United States in the domestic affairs of the nations with whom we have signed treaties of peace following World War II can be seen from the provisions in the peace treaties with Italy, Bulgaria, Hungary and Rumania, and particularly with settlement of the free territory of Trieste, in all of which we specifically provided for governmental responsibility for a non-discriminatory practice as to race, sex, language, religion, and ethnic origin.¹⁹ Our interest was in no way limited to treatment of American nationals.

The federal government having acted in the field of International Law and pledged our government to protect human rights and fundamental freedoms, no state within the union has the right to deny to any person such right or freedom upon racial grounds.

There cannot be any question that this legislation violates the letter and the spirit of the treaty obligations of the United States and under our Constitution must fall before the superior power of such treaty.

¹⁸ McDiarmid, "The Charter and the Promotion of Human Rights," 14 State Department Bulletin 210 (Feb. 10, 1946); and Stettinius' statement, 13 State Department Bulletin, 928 (May, 1945). See also letter of Acting Secretary of State Dean Acheson to the F. E. P. C. published at length in the Final Report of F. E. P. C. reading in part, "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries."

¹⁹ See description of these provisions in, "Making the Peace Treaties, 1941-1947" (Department of State Publications 2774, European Series 24); 16 State Department Bulletin 1077, 1080-82.

Conclusion

The actual effect of the California statute is to deny upon the basis of race, to a group of persons residing therein a right secured to all other persons. That this is discrimination under the Fourteenth Amendment has been clearly established in numerous cases before this Court. The Constitution protects all persons from discriminatory state action solely on the basis of race and prohibits the unequal application of the law.

It is respectfully submitted that the issues raised by the petition for certiorari are of such grave importance that this Court should review the decision of the court below.

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